Supreme Court, U.S.
FILED
MAR 13 1996
CLERK

No. 95-6510

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

COLEMAN WAYNE GRAY,

Petitioner,

vs.

J. D. NETHERLAND, Warden,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Has a federal constitutional question been "fairly presented" to the state courts, for the purpose if the habeas procedural default and exhaustion rules, when the only arguments made there were recitations of the facts, discussions of state law, and generic references to "due process" and "fair trial"?

2. When a defendant has demanded exclusion of evidence as a sanction for a discovery violation and not requested any lesser sanction, would a rule to the effect that admission of the evidence is constitutional error be a "new rule" under *Teague* v. *Lane*?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves a collateral attack on the final judgment of a state trial court based on arguments never fairly presented to the state courts and, in part, attempting to create new rules not existing at the time of the state decision. Such unwarranted attacks on final judgments are contrary to the rights of victims and society which CJLF was formed to protect.

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1. CJLF has written consent of both parties to file this brief.

SUMMARY OF FACTS AND CASE

On May 2, 1985, Coleman Gray and Melvin Tucker robbed, kidnapped, and murdered Richard McClelland. J. A. 355-356. Tucker testified that Gray was the triggerman. The jury convicted Gray of capital murder. J. A. 357. In the penalty phase, Gray admitted involvement in the crime but still denied being the triggerman. Brief for Petitioner 11.

Prior to guilt phase, the prosecution notified the defense it would accuse Gray in the penalty phase of having murdered Lisa Sorrell and her 3-year-old daughter Shanta. The prosecutor said he would only introduce statements of Gray to other persons as evidence of this.

Three days later, at the conclusion of the guilt phase, the prosecutor said he had additional evidence to introduce. The defense moved to exclude the additional evidence, but the trial court denied that motion, holding the evidence admissible. J. A. 172. In addition to the Sorrell murders, Gray's criminal record included 13 felony convictions, at least nine of which were violent. J. A. 358.

The defense did not move for a continuance. J. A. 365.

The conviction and sentence were affirmed on appeal. J. A. 109. Gray had counsel for state habeas, see J. A. 110, his petition was dismissed, J. A. 118, and the dismissal was affirmed. J. A. 126-127. The federal District Court granted habeas relief on the ground that the Commonwealth had "failed to give fair notice of its intention to prove" that Gray committed the Sorrell murders. J. A. 353. The Fourth Circuit reversed, holding that the District Court had impermissibly created a new rule contrary to *Teague* v. *Lane*. J. A. 367-368.

SUMMARY OF ARGUMENT

In order to coherently apply the rules governing habeas corpus, it is necessary to have a clear definition of what the "claim" is. A claim must be stated in both state and federal court in terms specific enough to identify the relevant precedents and apply them to the facts of the case before the court.

Petitioner claims, and the District Court held, that admission of the evidence of the Sorrell murders beyond that which the prosecutor earlier disclosed he would introduce violated the Constitution. Given that the defense did not move for a continuance upon learning of the additional evidence, such a claim would have to include a contention that either (1) exclusion is the sole constitutionally permissible remedy for such a discovery violation, or (2) the trial court is constitutionally required to order a continuance *sua sponte*.

Neither the above claim nor the *Brady* claim was ever fairly presented to the state courts. The arguments submitted to state courts were recitations of the facts, discussions of state law, and generic references to "due process" and "fair trial." Such arguments, this Court has repeatedly held, fail to fairly present federal claims. The claims must, therefore, be either unexhausted or procedurally barred.

Examination of this Court's *Teague* cases reveals some patterns which may help put more structure into previously general verbal formulations. A "new rule" for *Teague* includes any ground for decision which (1) overrules a precedent of this Court on point; (2) elevates an existing nonconstitutional rule to constitutional status; (3) longitudinally extends an existing rule to a situation with an impact on defendant similar in kind but less in degree or to a situation further removed from the core constitutional rule; (4) branches off in a new direction from the old rule to a situation different in kind; or (5) sculpts a specific rule of procedure out of a block of general principle. On the other hand, a rule is not new if it simply applies an existing, specific rule to a situation in which the defendant suffers the same type of harm in the same degree. Also, an application of a rule which must be applied case-by-case as a mixed question of law and fact is not a new rule.

Petitioner in this case attempts to create a new rule in several of the ways stated above. His proposed rule does not come close to qualifying for the second *Teague* exception.

ARGUMENT

I. The present case illustrates the need to clearly and precisely identify the claims in federal habeas proceedings.

A. General Principles.

Petitioner Gray presents the state and federal courts with a moving target. Question 1 in his brief on the merits in this Court is different from the Questions Presented in his certiorari petition. Compare Brief for Petitioner i, with Pet. for Cert. i. These claims are different from the claims presented to the state courts, as discussed further in part II, *infra*.

For over a hundred years, state prisoners have been required to present their federal claims to state courts first, before resorting to federal habeas corpus. See *Ex parte Royall*, 117 U. S. 241, 251-253 (1886); 28 U. S. C. § 2254(b). In addition to enforcing this requirement, federal courts must also determine whether claims are procedurally barred under the rule of *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977) or precluded by the rule of *Teague* v. *Lane*, 489 U. S. 288, 301 (1989).[2]

To correctly address these questions, one must have a clear understanding of what the "claim" is. Coherent discussion of whether a claim was fairly presented to the state courts and, if not, whether it is presently barred is not possible if the participants use the term "claim" to refer to completely different things. Much of the confusion in habeas corpus cases results from fuzzy definition of the claims.

A few basic rules for defining the claim come from this Court's decisions on exhaustion and procedural default. First, it has been established for at least 25 years, if not longer, that a mere statement of the facts on which a federal constitutional claim *could* be based does not state such a claim. Second, a petitioner claiming a violation of a particular provision of the federal Constitution must identify that provision to the state court.

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2. If the federal petition is not the first, federal courts must also determine whether the claim is barred by the rule of *McCleskey* v. *Zant*, 499 U. S. 467, 494-495 (1991).

Picard v. *Connor*, 404 U. S. 270 (1971) established and illustrates these rules. Connor complained to the state courts regarding the manner in which he was indicted, citing the state constitution and statutes. *Id.*, at 273. The only federal claim made in his state pleadings was an attempt to "incorporate" the Fifth Amendment's grand jury requirement, *ibid.*, contrary to *Hurtado* v. *California*, 110 U. S. 516, 534-535 (1884). When the federal Court of Appeals held that Connor had satisfied the exhaustion requirement for a federal equal protection claim, this Court reversed, holding that the claim must be "fairly presented." 404 U. S., at 275. "To be sure, respondent presented all the facts. Yet the constitutional claim the Court of Appeals found inherent in those facts was never brought to the attention of the state courts." *Id.*, at 277.

Anderson v. *Harless*, 459 U. S. 4 (1982) further established that a broad reference to the Fourteenth Amendment is not sufficient to fairly present to the state courts a more particular claim. Harless complained to the state courts that his jury's instruction on malice was erroneous, citing several state cases, in one of which "the defendant argued broadly that failure to properly instruct a jury violates the Sixth and Fourteenth Amendments." *Id.*, at 6. This claim is sufficiently different from a claim under *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), that the *Sandstrom* claim was unexhausted. The assertion of "a broad federal due process right to jury instructions that 'properly explain' state law," is a different claim from "the more particular analysis developed in cases such as *Sandstrom, supra*." *Harless*, 459 U. S., at 7 and n. 3. Thus, when a particular line of cases supports the petitioner's argument, that line or at least the reasoning of that line must be brought to the attention of the state courts. A generalized appeal to "due process" is not sufficient.

From *Connor* and *Harless*, it would seem to be obvious that a claim made in state court purely on state law, without even mentioning the federal constitution or laws, is a different claim from any federal claim. Yet, this point needed to be reiterated just last term. *Duncan* v. *Henry*, 130 L. Ed. 2d 865, 868, 115 S. Ct. 887, 888 (1995); *ibid.* (Souter, J., concurring). Henry had contended on direct appeal that certain evidence at his trial was a "miscarriage of justice." *Ibid.*; see Cal. Const., Art. VI,

§ 13 (state standard for reversible error). This is a different claim from an assertion that the same error violates the Due Process Clause of the Fourteenth Amendment.

The problems resulting from ill-defined claims produced a sharp exchange between the majority and dissent in *Engle* v. *Isaac*, 456 U. S. 107 (1982). The majority found the claim procedurally barred, *id.*, at 135, but the dissent discerned a different claim, which was unexhausted and should therefore have resulted in dismissal. *Id.*, at 141 (opinion of Brennan, J.). The majority noted,

> "It is, of course, possible to construe Isaac's confused petition and supporting memorandum to raise the claim described by JUSTICE BRENNAN. Many prisoners allege general deprivations of their constitutional rights and raise vague objections to various state rulings. A creative appellate judge could almost always distill from these allegations an unexhausted due process claim." *Id.*, at 124, n. 25.

Thus, the claims in a habeas petition do not include every claim that might be distilled from a "confused petition and supporting memorandum." A state prisoner on federal habeas corpus is requesting a drastic remedy: the nullification in collateral proceedings of the final judgment of the coequal state judiciary. Cf. *Miller* v. *Fenton*, 474 U. S. 104, 112 (1985). At least where the petitioner is represented by counsel,[3] it is not too much to ask that he state the grounds for such a drastic remedy in specific terms, in both state and federal courts.

A "claim," *amicus* submits, is an assertion that rule of law X applied to facts Y requires result Z. In order to fairly present the claim to the state courts, X, Y, and Z must be stated there in terms specific enough to permit the state court to rule on the claim, without doing counsel's job and reformulating the claim. Citation to the cases supporting the claim is the clearest and most concise way of identifying the rule of law, even if "book and verse" citation is not strictly required. See *Connor*, *supra*, 404

3. Indigent petitioners for whom counsel are not appointed may present special considerations. See *Maleng* v. *Cook*, 490 U. S. 488, 493 (1989) (*per curiam*). As those facts are not presented in this case, *amicus* will not discuss them.

U. S., at 278. *Harless, supra*, makes clear that broad references to due process are not sufficient.

The purpose of habeas review is to force trial and appellate courts to "toe the constitutional mark," *Teague* v. *Lane, supra*, 489 U. S., at 307 (plurality opinion) (internal quote marks and citations omitted), but a mark cannot be "toed" unless it is identified. State courts must be provided with enough definition to find the applicable precedents, for how else can they be expected to obey them? A fulminating petition long on adverbs and short on analysis will therefore "fairly present" few, if any, claims.

B. The Present Case.

With these principles in mind, we turn to the present case. From the statements of fact in the petitioner's pleadings, and from those in the Court of Appeals not denied by the petitioner, the following circumstances regarding the Sorrell evidence might be alleged in support of federal claims:

1. On December 2, 1985, prior to commencement of the guilt trial, defense counsel asked if the prosecution intended to make an issue of the Sorrell murders in the penalty phase. See Pet. for Cert. 3-4.

2. The prosecutor stated that he did intend to accuse Gray of the Sorrell murders, but that the evidence would consist of statements made by Gray to others. *Id.*, at 4.

3. Defense counsel did not investigate the details of the Sorrell case. Brief for Petitioner ("Pet. Brief") 39.

4. On December 5, after the guilt trial and three days later than the defense's original request, the prosecutor disclosed that he intended to introduce additional evidence. Pet. for Cert. 6.

5. The same evening, the police detective submitted to an interview with defense counsel. *Gray* v. *Thompson*, 58 F. 3d 59, 61, 64 (CA4 1995). Petitioner's statements of facts in his petition and brief do not claim that the detective refused to answer any questions asked of him or made any false statements to counsel.

6. The following morning, at the beginning of the penalty phase, defense counsel moved to exclude the additional evidence. Pet. Brief 6-9.

7. The trial judge denied the motion and admitted the evidence. *Id.*, at 9-10.

8. Even though allegedly inadequate notice was the basis for the exclusion motion, trial counsel did *not* move for the alternate remedy of a continuance to conduct the investigation. A three-day continuance would have been a complete cure for the prosecutor's so-called "sucker punch." See *id.*, at 39. "If the defense felt unprepared to undertake effective cross-examination, one would think a formal motion for continuance would have been forthcoming, but none was ever made; counsel moved only that the evidence be excluded." *Gray*, *supra*, 58 F. 3d, at 64. Petitioner's copious statements of facts contain no denial of this assertion.

9. The trial judge did not order a continuance *sua sponte*.

10. At the evidentiary hearing on federal habeas corpus over seven years later, the detective stated that Mrs. Sorrell's husband had originally been a suspect, along with a few facts which had supported that original suspicion. Pet. Brief 24-27. Petitioner does not allege that defense counsel asked the detective about other suspects the night before the penalty trial or that the detective made any false statements to counsel in this regard.

Evaluating these facts for possible federal claims, the first claim that would seem to fairly jump off the page on facts 3, 8, and 10 is ineffective assistance of counsel. Petitioner's present assertion that no investigation was appropriate because no competent lawyer would introduce details of the crime even if they showed *someone else committed it*, Pet. Brief 40, fails the "straight face" test. Petitioner's fire and brimstone rant about "disinformation . . . disabling defense counsel, " *id.*, at 28, cannot conceal the curability of the allegedly inadequate notice and counsel's lack of request for the cure.

Yet no claim of ineffective assistance has been made to the federal courts. See Memorandum Opinion of April 1, 1993, pp. 7-10 (summarizing claims, ineffective assistance not among them). There may well be a reason known only to the defense

why no such claim lies. We only know that no ineffectiveness claim has been made in the present proceeding.

Conceivably, a lawyer might make a claim that lack of notice of the specific evidence to support the allegation that Gray committed the Sorrell murders is itself a federal constitutional violation. The District Court originally understood that to be the claim and summarily rejected it on the merits. *Id.*, at 10, 11. That would, of course, be a correct decision, as this Court has held repeatedly that there is no constitutional right to discovery. *Weatherford* v. *Bursey*, 429 U. S. 545, 559 (1977); *Wardius* v. *Oregon*, 412 U. S. 470, 474 (1973). Petitioner not only disclaims such an argument in this Court, but asserts he has never made this claim. Pet. Brief 46, n. 37.

A different contention would be that once a prosecutor has stated the evidence he intends to introduce, either voluntarily or in compliance with state law, he is bound by that statement. Although petitioner does not expressly say so, to make that contention on the facts of the present case, one would also have to contend that either (1) exclusion of the additional evidence is the sole permissible remedy for a violation of this rule, since that is the only remedy the defense requested, or (2) the trial court is constitutionally required to order a continuance *sua sponte*, if that is the other remedy the state wishes to make available. For brevity, we will call this the incomplete notice claim.

A variation on the incomplete notice claim would make the rule turn on the prosecutor's intentions at the time of his initial statement. This Court adopted such a distinction in cases where testimony is alleged to have been perjured, which is only a federal constitutional violation if the prosecutor knew at the time it was perjured. *Mooney* v. *Holohan*, 294 U. S. 103, 112 (1935). An analogous rule would be that it is federal constitutional error for the prosecutor to state what evidence he intends to introduce when he knows at the time of the statement that he actually intends to introduce additional, undisclosed evidence. Again, however, to make a claim of real injury on the facts of the present case, the rule would also have to include a requirement that the trial court either exclude the evidence on motion or order a continuance *sua sponte*. For lack of a better label, we will call this the "sandbagging" claim.

Finally, there is petitioner's sole contention on established law, that the prosecution failed to disclose evidence known to it which was materially exculpatory as to penalty. This is the rule of *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963).

With the claims defined, we can turn to the questions of whether they are properly before the federal court on habeas, and, if so, whether they state grounds for habeas relief. This Court has said that the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989) is a "threshold question in every habeas corpus case," *Caspari* v. *Bohlen*, 127 L. Ed. 2d 236, 245, 114 S. Ct. 948, 953 (1994), but has not said whether it should be addressed before the issues of exhaustion and procedural default. *Amicus* will address the exhaustion/default issues first, because they go to the question of whether the claims are properly before the federal courts in this case, and then address the *Teague* issues, which go to the question of whether the claims are the kinds of claims for which habeas relief is properly granted. See *Mackey* v. *United States*, 401 U. S. 667, 684 (1969) (opinion of Harlan, J.); *Bohlen*, 127 L. Ed. 2d, at 245, 114 S. Ct., at 953 (*Teague* issue "fairly included" in question of the merits).

II. None of petitioner's claims before this Court was fairly presented to the state courts.

The rules of exhaustion and procedural default have different theoretical bases. Exhaustion is a rule of comity between state and federal courts. See *Rose* v. *Lundy*, 455 U. S. 509, 518 (1982). Procedural default is based on the principle that when a claim is defaulted the state judgment rests on independent state grounds and not on a reviewable determination of a federal question. See *Harris* v. *Reed*, 489 U. S. 255, 260 (1989). Yet the two doctrines are linked by the fact that a claim is deemed exhausted, even though never fairly presented to the state courts, if there is no longer any remedy available there, *i.e.*, if it is procedurally defaulted. See *Castille* v. *Peoples*, 489 U. S. 346, 350 (1989).

Just as the defendant can default his claims by not raising them at the proper time in state court, so the prosecution can lose this defense by not asserting it when required. See *Engle* v.

Isaac, 456 U. S. 107, 124-125, n. 26 (1982); but see *Granberry* v. *Greer*, 481 U. S. 129, 131 (1987) (belated unexhaustion claim discretionary). However, if the state court rules on the merits rather than relying on default, then the claim is reviewable on federal habeas. See *Harris*, *supra*, 489 U. S., at 263. Analogously, then, if the District Court has ruled on procedural default, whether or not raised by the state, that issue should be reviewable in the Court of Appeals. As the prevailing party in the Court of Appeals, respondent can assert here any ground which would have been a valid basis for decision there, even if that court's decision was on another ground. *Dandridge* v. *Williams*, 397 U. S. 471, 475, n. 6 (1970). The present case is distinguishable from *Schiro* v. *Farley*, 127 L. Ed. 2d 47, 56, 114 S. Ct. 783, 788 (1994), in that the Commonwealth did raise default at the petition stage. Brief in Opposition i.

In the present case, the District Court characterized the claims arising out of the admission of the Sorrell evidence as a single claim and held that the claim "was consistently raised in the State courts and is not procedurally defaulted." Pet. Brief 19, quoting Memorandum Opinion on Order Denying Judgment 3-4. The correctness of that ruling is properly before this Court.

A. The Incomplete Notice Claim.

In evaluating whether a claim has been fairly presented, the principal focus should be on the appellant's own statement of the claim. Most reviewing courts require a statement of the issues somewhere other than the body of the argument. See, *e.g.*, Supreme Court Rule 14.1(a) (questions presented); Fed. Rule App. Proc. 28(a)(3) (issues presented for review). In the heading to his argument on the Sorrell evidence on direct appeal, counsel for Gray stated the claim thusly:

> "The trial court erred in overruling Gray's objection to the admission of certain evidence, at the penalty phase regarding other crimes which the Commonwealth alleged Gray committed, but for which Gray had never been charged, indicted, tried, or convicted. (Assignment of Error #41)." Brief on Appeal 1 (capitalization normalized).

This would appear on its face to be an argument about the general admissibility of evidence of prior, uncharged miscon-

duct, a question generally within the realm of state evidence law and not the federal Constitution. No opinion of this Court recognizes this issue to be one of federal constitutional law, and the last opinion discussing such issues expressly reserved that question. *Estelle* v. *McGuire*, 502 U. S. 62, 67-68 (1991).

The body of the argument, pages 1 to 4, confirms this impression. Gray cited only one federal constitutional case, *Lee* v. *Illinois*, 476 U. S. 530 (1986), to support his objection to the testimony of the accomplice, Melvin Tucker. That is the evidence which the defense *was* notified would be presented and thus is irrelevant to the claims before this Court.

For his lack of notice point, Gray cited *Peterson* v. *Commonwealth*, 225 Va. 289, 302 S. E. 2d 521, 526 (1983), which is a decision stating the "preferred practice" and not a constitutional rule. The only other citations in the argument are to cases where evidence of prior uncharged crimes was admitted, with discussion of why they are distinguishable. The only mention of the Constitution with regard to the evidence at issue here is in the final paragraph:

> "Gray's counsel were not advised that Det. Slezak would testify or that color photographs would be offered, until the conclusion of the 'Guilt Trial' on December 5, 1985. To permit such evidence as the details of the Sorrell murders, enlarges the scope permitted by *Watkins* [a state case] to such an extent that Gray's right to a fair trial, as guaranteed by the U. S. and Virginia Constitutions, was violated."

The situation is strikingly similar to *Picard* v. *Connor*, 404 U. S. 270 (1971) and *Anderson* v. *Harless*, 459 U. S. 4 (1982). We have a meritless reference to one federal point, cf. *Connor*, 404 U. S., at 277, and a single assertion without citation in the broadest possible terms, due process in *Harless*, 459 U. S., at 7, and fair trial in the present case. The state court properly understood the claim to be one of admissibility under state evidence law and analyzed it accordingly. *Gray* v. *Commonwealth*, 233 Va. 313, 346, 356 S. E. 2d 157, 175 1987); cf. *Harless*, 459 U. S., at 7.

On pages 45-46 of his brief, petitioner makes the following assertion:

> "[T]he state, including in the sentencing phase of a capital trial, may not engage in conduct which affirmatively misleads opposing counsel in such a way so as to deny the defendant a meaningful opportunity to develop his response, to explain, or to rebut the state's presentation on an issue the state itself has made determinative of the outcome. Although the Virginia Supreme Court held to the contrary, the 'short answer' to the state court's decision is that it 'made a serious mistake.'"

Petitioner, not the Virginia Supreme Court, is seriously mistaken. That court made no such ruling for the simple reason that no such argument has ever been presented to it. The state court was presented with an objection to the admission of evidence, not a claim of denial of due process through prosecutor misconduct. Had Gray objected to the timing problem as such, distinct from his claim that the evidence was inadmissible, we would now have a ruling on whether his failure to move for a continuance defaulted that objection under state law. Cf. *Dugger* v. *Adams*, 489 U. S. 401, 408 (1989) (state court default deprived federal courts of ruling on predicate question of state law). We do not have that ruling because petitioner did not fairly present that question on appeal.

Next, we move to the state habeas petition. Counsel for Gray in this Court chooses to quote the body of the argument supporting the claim for his characterization of the claim. Pet. Brief 13. Again, *amicus* believes that the better practice is to look first at state habeas counsel's own statement of the claim: "IX. The Commonwealth introduced unfairly prejudicial testimony and other evidence regarding the Sorrell murders in order to establish future dangerousness."

The body of the argument cites the same cases as the direct appeal brief. Compare Petition for Writ of Habeas Corpus [State] 37-39, with Brief on Appeal 1-4. *Gregg* v. *Georgia*, 428 U. S. 153 (1976) is cited only in the negative, that it "did not go so far as to allow the kind of evidence such as the Sorrell murders which the Commonwealth introduced in this case." Petition for Writ of Habeas Corpus 38. The paragraph which petitioner quotes selectively reads in its entirety as follows:

"76. The Commonwealth did not disclose its intention to use the Sorrell murders as evidence until such a late date that it was impossible for Gray's defense counsel to reasonably prepare for its use. Gray was literally tried and convicted in Suffolk of an uncharged and unproved offense in Chesapeake, by the use of what amounts to no standard of proof. The evidence was entirely circumstantial except for the testimony of Gray's co-defendant Tucker, who testified pursuant to a plea bargain. The only fair defense would be either the requirement of proof beyond a reasonable doubt or for the defendant's innocence to be proved. The first was not achieved and the second was impossible, *and in fact no amount of preparation time on the part of defense counsel would have been adequate*. See J. A. at 1374-1375 for a lay opinion of the fundamental fairness of this aspect of the case. The use of such proof and the way in which it was used was simply outrageously unfair and made a mockery of Gray's rights to due process of law under the Fourteenth Amendment and the Virginia Constitution." *Id.*, at 39-40 (italics added; underline in original).

The errors apparently claimed by this paragraph are the admission of the evidence and the lack of an instruction to the jury on a burden of proof for prior offenses.[4] Far from claiming error in the court's failure to grant more preparation time, state habeas counsel disclaimed such a remedy. The only federal constitutional argument is a generic reference to due process, which was found insufficient in *Harless, supra*.

Within a unitary judicial system, it is a common rule that collateral attack generally cannot be used either for claims that were raised and rejected on appeal or for claims that could have been made on appeal but were not. The federal courts follow these rules in 28 U. S. C. § 2255 cases, see 2 J. Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure §§ 41.4a,

4. Some states have such a rule, but it is not a constitutional mandate. See, *e.g.*, *People* v. *Robertson*, 33 Cal. 3d 21, 54, 655 P. 2d 279, 298 (1982) (acknowledging new statute could have overturned rule, though holding it did not); see also *Dowling* v. *United States*, 493 U. S. 342, 348 (1990) (prior offense introduced as evidence need not be proven beyond a reasonable doubt).

41.7c, pp. 1197, 1223 (2d ed. 1994), and so do the courts of Virginia on state habeas. *Hawks* v. *Cox*, 211 Va. 91, 175 S. E. 2d 271, 274 (1970); *Slayton* v. *Parrigan*, 215 Va. 27, 207 S. E. 2d 680, 682 (1974).

Gray's state habeas petition gave the state courts no reason to believe his habeas claim IX was a different claim from his assignment of error #41 on appeal. The phrasing of the claim was substantially the same. The same cases were cited in argument. Neither asserted any federal authority against the evidence now in question beyond the generic references to due process and fair trial. In the Virginia Supreme Court, state habeas counsel went so far as to expressly state that he was asking for reconsideration of the same claim. "VIII. This Court Should Reexamine [Its] Ruling in *Gray* v. *Commonwealth*, 233 Va. 313, 356 S. E. 2d 157 (1987) a[s] It Relates to Gray's Claim IX and the Sorrell Murders." Petition for Appeal 28. On page 31, habeas counsel asserted he was presenting "a different treatment of the issues," but did not claim a different issue. Not surprisingly, both courts denied relief under the *Hawks* rule.[5]

In summary, on neither appeal nor state habeas did counsel for *Gray* present the incomplete notice claim to the Virginia courts. They certainly had the "tools to construct their constitutional claim." See *Engle* v. *Isaac*, 456 U. S. 107, 133, 145 (1982). *Smith* v. *Estelle*, 602 F. 2d 694 (CA5 1979) had been decided 11 years earlier. The decision to pursue other claims instead may very well have been a rational decision that the claim was weak and should properly be winnowed out. See *Murray* v. *Carrier*, 477 U. S. 478, 484 (1986). For whatever reason, it was not fairly presented to the state courts within the meaning of *Connor*, *Harless*, and *Henry*.

5. Petitioner notes that the Virginia Supreme Court only made its "plain statement" of procedural bar on the prompting of the Commonwealth. Pet. Brief 14, n. 11. It does not matter. Five months later this Court decided *Ylst* v. *Nunnemaker*, 501 U. S. 797, 804 (1991). Under the "look through" rule of that case, the plain statement of the circuit court would have sufficed.

B. The Sandbagging Claim.

As noted earlier, a variation on the incomplete notice claim adds the factual element that the prosecutor knew at the time of his representation that it was false. *Smith* itself did not place great weight on such a finding, holding that the claim would lie either way. 602 F. 2d, at 702. Even so, petitioner asserts it strongly in this Court.

The additional factual element makes the sandbagging claim one that could not have been raised on direct appeal, as the appellate record does not contain any statement by the prosecutor of such nefarious intent.[6] To be presented to the state courts, it would have to be presented on state habeas, but it was not. The state habeas pleadings are devoid of any reference to the fact now asserted. Petitioner did not ask for an evidentiary hearing on the Sorrell evidence questions other than a somewhat confused reference to "establish[ing] the fact that they did likely have an effect on the jury." J. A. 115-116. Gray appealed the denial of an evidentiary hearing on other claims, but not on this one. J. A. 120-124.

As with the incomplete notice claim, the legal basis of this claim was never fairly presented to the state court. In addition, the factual basis was never presented. See *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 11-12 (1992); *Gray* v. *Thompson*, 58 F. 3d 59, 68 (CA4 1995) (Hall, J., concurring).

C. The Brady Claim.

The *Brady* claim, like the sandbagging claim, depends on facts not *actually* known to defense counsel at trial, on appeal, or apparently on state habeas. These facts may well have been readily available, as the detective did submit to an interview by

6. More precisely, petitioner has not called the attention of the Court or counsel to any such indication in the trial record, which we may safely assume he would if it existed. See Brief for Petitioner 6-9. He refers only to the federal habeas proceedings for this assertion. See, *e.g.*, *id.*, at 38. If the fact now urged upon the court with such vigor was so important, it seems strange that trial counsel did not simply ask the prosecutor if he had known all along that he intended to present the additional evidence.

defense counsel prior to testifying, but we can assume for this argument they were not actually known.

Nothing which even remotely sounds like a *Brady* claim appears in petitioner's state pleadings regarding the Sorrell matter.

D. Effect of Failure to Present.

Absent a deficiency in state procedures, a claim which has never been fairly presented to the state courts *must* be either unexhausted or procedurally barred. The codification of the exhaustion rule can be found in 28 U. S. C. § 2254(b) and (c):

> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> "(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Absence of state corrective process would exist in a state which did not allow appeals in criminal cases,[7] or which did not have some collateral review procedure for the adjudication of claims outside the appellate record. Few, if any, states are so deficient in their review procedures today, and so this clause is rarely, if ever, invoked. The provision for "circumstances rendering such process ineffective" was important in a bygone era. Congress probably had *Moore* v. *Dempsey*, 261 U. S. 86, 91 (1923) in mind. Again, though, such circumstances are rare to nonexistent today.

On its face, the exhaustion language would appear to prohibit federal habeas review of a claim for which the defendant once

7. There is no constitutional requirement to provide appeals. See *Douglas* v. *California*, 372 U. S. 353, 356 (1963).

had a state remedy but which he allowed to lapse, whether intentionally or inadvertently. This is, in fact, how the language was construed soon after its enactment. "The statute requires that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ." *Brown* v. *Allen*, 344 U. S. 433, 487 (1953).

That interpretation has since been abandoned, however, and the remedies referred to in section 2254(b) are now thought to be only those still available at the time of the federal petition. See *Engle* v. *Isaac*, 456 U. S. 107, 125-126, n. 28 (1982). Thus, where the "fair presentation" requirement has not been met, "[t]he requisite exhaustion may nonetheless exist . . . if it is *clear* that [the habeas petitioner's] claims are now procedurally barred under [state] law." *Castille* v. *Peoples*, 489 U. S. 346, 351 (1989) (emphasis added). In this situation, *Harris* v. *Reed*, 489 U. S. 255 (1989) is inapplicable, *Teague* v. *Lane*, 489 U. S. 288, 298-299 (1989), and the federal court must examine state procedural default law itself. See *id.*, at 297-298 (examining Illinois default law).

Because the consequence of nonexhaustion is dismissal of the entire petition, *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982),[8] a petitioner who has not met the fair presentation requirement can avoid dismissal only by showing that his own claim is, in fact, procedurally barred in state court. Under the rule of *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977), however, that same showing will bar a grant of relief unless the exceptions to the procedural default rule can be met.

If petitioner's claims are now procedurally barred in state court, as seems likely from the strictness of Virginia's default rules applied in this case, *Murray* v. *Carrier*, 477 U. S. 478,

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8. *Lundy* predated *Teague*, which greatly narrowed the authority of habeas courts to grant relief on the kinds of creative claims which are especially likely to emerge as unexhausted habeas claims. Given that both the unequivocal wording of the statute and the comity policy which underlies it only forbid a *grant* of relief on an unexhausted claim and not a *denial* of relief, both efficiency and federal-state relations would be better served by permitting federal habeas courts to deny unexhausted claims which are either meritless on their face or *Teague*-barred.

482-483 (1986), *Smith* v. *Murray*, 477 U. S. 527, 533 (1986), and *Coleman* v. *Thompson*, 501 U. S. 722, 727-728 (1991), then relief cannot be granted unless the cause and prejudice test is met.

The concurring judge on the Court of Appeals panel, the only one to address the issue, thought Gray's failure to meet this test so obvious as to only warrant a single sentence. *Gray* v. *Thompson*, *supra*, 58 F. 3d, at 68 (Hall, J. concurring). Petitioner's brief makes no effort to dispute this holding. Therefore, all of the claims before this Court may properly be denied as procedurally barred.

III. The "sandbagging" claim is *Teague*-barred.

Discovery violations occur every day in American courts; the difficult question is what to do about them. Exclusion of the offending party's evidence is generally regarded as a drastic sanction, reserved for extreme cases. See, *e.g.*, Cal. Penal Code § 1054.5(c).

The present case is a mirror image of *Taylor* v. *Illinois*, 484 U. S. 400 (1988). In that case, as in this one, the defendant sought to make a federal constitutional issue out of the remedies for discovery violations in state court. In that case, it was defense counsel who tried to call a last minute witness, and the trial court found this to be a willful violation. *Id.*, at 405-406. The Court rejected the "argument that preclusion is *never* a permissible sanction for a [defense] discovery violation," declining "to attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case." *Id.*, at 414 (emphasis in original).

While Taylor argued that less drastic sanctions were available and should have been used, *id.*, at 413, Gray's failure to ask for less drastic sanctions and insistence that admission of the evidence was constitutional error must logically rest on a premise that any lesser sanction would be constitutionally inadequate. He invites this Court to open a can of worms, federalizing and constitutionalizing the question of when state court judges *must* exclude evidence as a sanction for discovery violations. This Court has, on a number of occasions, recognized the problems

in making constitutional issues out of violations of nonconstitutional rules. See *Sandin* v. *Conner*, 132 L. Ed. 2d 418, 429, 115 S. Ct. 2293, 2299-2300 (1995); *United States* v. *Caceres*, 440 U. S. 741, 755 (1979); Brief of the Criminal Justice Legal Foundation as *Amicus Curiae* in *Whren* v. *United States*, No. 95-5841, pp. 9-15.

This rule would not be new, he says, because it follows from the principle of reliability in capital sentencing information established in *Gardner* v. *Florida*, 430 U. S. 349 (1977). Brief for Petitioner 45. If this argument sounds hauntingly familiar, it is with good reason. That was *precisely* the argument made and rejected in *Sawyer* v. *Smith*, 497 U. S. 227, 235-236 (1990).

Indeed, the present case is such a straightforward application of *Sawyer* as to render it "uncertworthy." If the *Teague* issue in this case is worthy of the Court's plenary attention, it would seem to be because of the complaint of *Turner* v. *Williams*, 35 F. 3d 872, 887, n.16 (CA4 1994) that this Court's *Teague* decisions have been inconsistent and unclear.

The concurring judge in the Court of Appeals panel found language in *Turner* to be inconsistent with the panel majority's straightforward application of this Court's *Teague* precedents, and then resolved that dilemma by following the circuit precedent instead of this Court's precedents. *Gray v. Thompson*, 58 F. 3d 59, 67-68 (CA4 1995) (opinion of Hall, J.). This last step is as erroneous as it is surprising. *Turner* strayed far afield, and much of its language is irreconcilable with this Court's precedents. It is wrongly decided and should be expressly disapproved.

A. Summary of Teague Cases.

Since the verbal formulations of what is a "new rule" have apparently provided insufficient guidance, it may be appropriate at this point to summarize the holdings of this Court's *Teague* cases to date.

Three cases involve the rule of *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (plurality). That rule is that the sentencer in a capital case may not be precluded from considering *any* circumstance the defendant puts forward as mitigating.

Penry v. *Lynaugh*, 492 U. S. 302, 319 (1989) held that application of *Lockett* to a Texas case where the proffered mitigating circumstance would not tend toward a favorable answer on any of the special sentencing questions would not be a new rule. The *Penry* Court noted that approval of the Texas system in *Jurek* v. *Texas*, 428 U. S. 262, 272 (1976) (lead opinion) had been expressly based on an assurance not met in Penry's case. 492 U. S., at 319.

Saffle v. *Parks*, 494 U. S. 484, 490 (1990), however, held that *Lockett* did not, of its own force, govern *how* the jury was to consider the mitigating circumstance. Hence, a prohibition against instructing the jury not to consider sympathy would have been a new rule.

Finally, *Graham* v. *Collins*, 122 L. Ed. 2d 260, 275, 113 S. Ct. 892, 902 (1993) held that application of *Lockett* in Texas to require additional instruction on youth as mitigation, when the "future dangerousness" issue did permit *some* consideration of youth, would be a new rule.

Each of the other *Teague* cases involves a different rule. *Edwards* v. *Arizona*, 451 U. S. 477, 485 (1981) forbade police to ask again for a *Miranda* waiver when an in-custody suspect has already requested counsel once. *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990) held that application of this rule to a situation where the prior refusal was for a different offense would be a new rule.

Sawyer v. *Smith*, *supra*, 497 U. S., at 235-236, held that application of such general principles as reliability in sentencing to forbid a specific type of prosecutor argument would be a new rule. *Sawyer* also held that taking a nonconstitutional rule of evidence or procedure and raising it to constitutional status would be a new rule. 497 U. S., at 239.

Godfrey v. *Georgia*, 446 U. S. 420, 428-429 (1980) held that an aggravating circumstance of "outrageously or wantonly vile, horrible and inhuman" was too vague to properly narrow application of the death penalty. *Stringer* v. *Black*, 503 U. S. 222, 228-229 (1992) held (and the state conceded) that application of this rule to a circumstance of "especially heinous, atrocious, or cruel" was not a new rule.

Stringer also held that application of this rule to states which follow the Florida model, limiting aggravating circumstances in the final "weighing" stage to those listed in the statute, was not a new rule. Invalid aggravators cause the defendant more harm in such states than in those such as Georgia, where the final stage is wide open.[9]

Stringer also held that it was not a new rule to classify Mississippi's system with the Florida model, rather than with Louisiana, in which the second tier of narrowing is constitutionally redundant. 503 U. S., at 233. This holding was based on Mississippi Supreme Court decisions, *id.*, at 234, on the premise that the federalism concerns underlying *Teague* do not apply when the highest court of the state has already accepted the argument in question. *Id.*, at 235.

Gilmore v. *Taylor*, 124 L. Ed. 2d 306, 319, 113 S. Ct. 2112, 2118 (1993) refused to create, on habeas, a constitutional rule against jury instructions that, at most "created a risk that the jury would fail to consider evidence that related to an affirmative defense . . . ." General phrases in one case involving a claim of *Lockett* error and another involving harmless error analysis of unconstitutional presumptions did not save this proposal from the "new rule" bar. *Id.*, at 318, 113 S. Ct., at 2118.

Bullington v. *Missouri*, 451 U. S. 430 (1981) held that the Double Jeopardy Clause extends to capital sentencing proceedings, giving as rationales both the trial-like nature of the proceedings, *id.*, at 438, and the unique considerations of capital sentencing. *Id.*, at 441-442, n. 15. A fair reading of the opinion, though, shows that the trial-like nature was the predominant rationale. Even so, *Caspari* v. *Bohlen*, 127 L. Ed. 2d 236, 247-248, 114 S. Ct. 948, 955 (1994) held that extension of *Bullington* to noncapital sentencing, however trial-like, would be a new rule. This holding was based as much on subsequent cases' treatment of *Bullington* as it was on *Bullington* itself.

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9. *Stringer* and other cases refer to the two types as "weighing" and "nonweighing" states. This terminology may be ripe for reconsideration. See *Flamer* v. *Delaware*, 68 F. 3d 736, 748 (CA3 1995) ("quite misleading"); *id.*, at 766-767 (Lewis, J., dissenting).

Finally, *Goeke* v. *Branch*, 131 L. Ed. 2d 152, 115 S. Ct. 1275 (1995) (*per curiam*) illustrates the depth of misunderstanding of *Teague*, or perhaps stubborn resistance to it, remaining in some Courts of Appeals. Branch was a fugitive whose appeal was dismissed. A precedent of this Court held that such dismissals were not a constitutional violation. *Allen* v. *Georgia*, 166 U. S. 138, 140 (1897). Based only on a nonconstitutional federal case under this Court's supervisory power and on a right-to-counsel case forbidding dismissal for counsel's unprofessional errors, the Eighth Circuit held that forbidding fugitive dismissals would not be a new rule. *Branch*, 131 L. Ed. 2d, at 158, 115 S. Ct., at 1277. This Court summarily, unanimously reversed.

Based on the facts and results of these cases, a few observations about new rules can be made. *Amicus* offers these not as changes to the verbal formulation of *Teague*, but as somewhat more concrete guides regarding how this Court has actually applied those formulations.

Precedent on Point. If an unreversed precedent of this Court says practice X is constitutional, then a rule that practice X is unconstitutional is new. See *Parks*, *supra*, 494 U. S., at 488; see also *Branch*, 131 L. Ed. 2d, at 159, 115 S. Ct., at 1278. Even before *Teague*, the lower federal courts had no authority to declare an old Supreme Court precedent superseded. *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U. S. 533, 535 (1983) (*per curiam*).

Prior Nonconstitutional Rule. Where the rule in question has been in effect but has always been understood to be nonconstitutional, the elevation of that rule to constitutional status is new. See *Sawyer*, *supra*, 497 U. S., at 238-239; *Branch*, 131 L. Ed. 2d, at 158, 115 S. Ct., at 1277.

Longitudinal Extension. This is the most common type of new rule. A rule is new if it extends an existing rule to a situation where the impact on the defendant is similar in kind but less in degree. Similarly, where the new application is a step further removed from the core constitutional right, that is a new rule. Lockett and Penry both suffered the same injury in the same degree. Their juries were allowed to consider some mitigating circumstances, but were forbidden to consider *at all* the most compelling circumstance in the case. Graham, by

contrast, was less handicapped in arguing his case. His jury could consider his mitigating circumstances, but not in every way he wished. *Graham* v. *Collins*, *supra*, 122 L. Ed. 2d, at 275, 113 S. Ct., at 902.

Application of the *Godfrey* rule to the "especially heinous" circumstance, see *Stringer*, *supra*, is not an extension. "Heinous" is not less vague than "vile," and "especially" is no better at narrowing than "outrageously." Application of that rule to Florida-type systems is a movement in the opposite direction, since the impact of vague aggravations is greater there.

Butler is an example of a rule being extended further from the core constitutional right. *Miranda* v. *Arizona*, 384 U. S. 436 (1966) created a protective buffer zone around the privilege against self-incrimination. *Edwards* v. *Arizona*, *supra*, similarly created a buffer to protect incarcerated suspects from being badgered into waiving *Miranda*. That danger is further reduced when the police request a waiver for the first time for a different crime. *Arizona* v. *Roberson*, 486 U. S. 675, 690 (1988) (Kennedy, J., dissenting). Thus the *Roberson* rule broke new ground, even further away from the core of the Fifth Amendment.

It does not matter, for this purpose, if the extension of the existing rule is "only a 'short step.'" *Bohlen*, *supra*, 127 L. Ed. 2d, at 250, 114 S. Ct., at 957. So long as it is an extension further from the constitutional core or to a lesser interest of the defendant, it is a "new rule."

Branching Off. Somewhat different from the longitudinal extension is an attempt to branch off in a new direction, not necessarily further from the core right, but different in kind from the existing rule. Parks wanted his jury to consider sympathy for him in its deliberations. Sympathy may be a more powerful argument for the defendant than some of the more extreme applications of *Lockett*, see, *e.g.*, *Boyde* v. *California*, 494 U. S. 370, 382, n. 5 (1990) (prison choreography award as "mitigating"), but it is different in kind from what *Lockett* requires, so it would have been a new rule. *Parks*, *supra*, 494 U. S., at 490.

Specific from General. In the cases finding applications of old rules, rather than creation of new ones, the old rule invariably addressed a specific practice. *Penry* was merely an

application of *Lockett*, addressing the specific issue of instructing juries on mitigating circumstances in capital cases. *Stringer* was an application of *Godfrey*, regarding the specificity required for a death-eligibility circumstance.

In contrast, the sculpting of a specific rule of procedure out of a block of general principle has invariably been considered a new rule. The rule forbidding prosecutor arguments misleading the jury about appeals, though based on the need for reliable sentencing, was nonetheless new. *Sawyer*, *supra*, 497 U. S., at 235-236.

The same is true of the proposed rule with regard to jury instructions in *Gilmore* v. *Taylor*, 124 L. Ed. 2d, at 319, 113 S. Ct., at 2118, even though based on due process grounds. The requirement of proof beyond a reasonable doubt "has spawned a number of corollary rules . . . ." *Id.*, at 323, 113 S. Ct., at 2122 (O'Connor, J., concurring in the judgment). Yet the rule Taylor sought was not one of those corollaries. His rule would have required a new, specific rule derived from the broad principle. That would be a new rule.

In *Goeke* v. *Branch*, *supra*, 131 L. Ed. 2d, at 157-158, 115 S. Ct., at 1277, it was error to strike down a state's fugitive dismissal rule without specific constitutional precedent dealing with that particular aspect of criminal procedure, merely because the Court of Appeals felt that the rule was "arbitrary" and "oppressive." That would have been a new rule.

Mixed Questions. A different situation is presented by those rules which will *always* depend on the specific facts of the individual case. The application of *Jackson* v. *Virginia*, 443 U. S. 307 (1979), for example, will always present a mixed question, and its resolution will always require a detailed factual discussion. See *Wright* v. *West*, 505 U. S. 277, 308-309 (1992) (Kennedy, J., concurring in the judgment). There is only one *Jackson* rule, that the evidence must be sufficient that a reasonable fact-finder could convict, but it must be applied anew to each case.[10] "Custody" for the *Miranda* rule, see *Thompson* v.

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10. An attempt to define a category of evidence and create a specialized rule for that category would, however, be a new rule. See *id.*, at 315 (Souter, J., concurring in the judgment).

Keohane, 133 L. Ed. 2d 383, 394, 116 S. Ct. 457, 465 (1995), "materiality" for the *Brady* rule, see *Kyles* v. *Whitley*, 131 L. Ed. 2d 490, 508, 115 S. Ct. 1555, 1567 (1995), and "prejudice" for ineffective assistance, see *Strickland* v. *Washington*, 466 U. S. 668, 693 (1984), are other examples of case-by-case, "look at all the circumstances" rules. Each of these rules deals with a specific aspect of criminal procedure and sets a standard for application. None of them is the kind of general principle petitioner seeks to invoke in this case.

Comparing the present case with the earlier case, it is clear petitioner seeks to create a new rule. He cannot cite an existing rule which is anywhere near as specific as the *Lockett* rule cited by Penry or the *Godfrey* rule cited by Stringer. *Mooney* v. *Holohan*, 294 U. S. 103, 110 (1935) involved an allegation of fraud on the court and the defendant vastly greater in magnitude than anything the prosecutor is accused of here. *Lankford* v. *Idaho*, 500 U. S. 110 (1991) (decided long after Gray's sentence became final) involved a surprise as to the *entire* penalty phase, not mere items of evidence in it.

The notion that the prosecutor's failure to disclose each item of evidence he intends to put on in the penalty phase, even if intentional, *must* be remedied by exclusion of the evidence, and not by any lesser sanction, would surely be a new constitutional rule. So, too, would a rule that if continuance is the remedy it must be ordered *sua sponte*. Petitioner's contention is a proposal for a new rule under *Teague*.

B. Turner v. Williams.

The concurring judge in the present case based his rejection of the *Teague* argument on *Turner* v. *Williams*, 35 F. 3d 872 (CA4 1994), cert. denied, 131 L. Ed. 2d 216 (1995). Because that case is a prime example of misunderstanding *Teague*, it is appropriate to take a closer look.

Turner's claim was an attack on the Virginia "vileness" factor, which on its face is the same as the one struck down in *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980). *Turner*, 35

F. 3d, at 880 and n. 7.[11] *Godfrey* differed from *Turner*, though, in that Turner's jury received limiting definitions of the vague terms of the bare instruction, while Godfrey's jury did not. *Id.*, at 880, 891-892.

The *Turner* majority states at one point "we are satisfied that a state court in 1988 would have felt *compelled* to conclude that *Godfrey* and *Cartwright dictate* the rule or result Turner seeks," *id.*, at 882 (emphasis added), but ten pages later finds Turner's claim to be without merit. See *id.*, at 892. This is a contradiction.

Surely "reasonable minds," see *Butler* v. *McKellar*, *supra*, 494 U. S., at 415, can always reach the correct result. A correct application of precedent cannot be "an illogical or even a grudging application." See *ibid*. Certainly a correct interpretation is also a "reasonable interpretation." See *Caspari* v. *Bohlen*, *supra*, 127 L. Ed. 2d, at 249, 114 S. Ct., at 956. On a question of pure law, as opposed to a mixed question of law and fact, a wrong rule is *per se* a new rule.

The *Turner* majority thought the dissent "overlooks the significance of *Wright* v. *West*," 35 F. 3d, at 886, n. 14, but *West* has little significance as precedent. As a case with no majority opinion, the holding of *West* is that of the opinion concurring on the "narrowest grounds," *Marks* v. *United States*, 430 U. S. 188, 193 (1977) (internal quotations omitted), which is simply that the facts of the case pass the *Jackson* standard. See *West*, *supra*, 505 U. S., at 297 (White, J., concurring in the judgment). *West* simply establishes *no* precedent on the *Teague* question. The several opinions in the case have value as explanation, but not precedent.

The rule existing before and after *West* is that a mixed question of law and fact is renewed *de novo* on habeas corpus. *Miller* v. *Fenton*, 474 U. S. 104, 112 (1985); *Thompson* v. *Keohane*, 133 L. Ed. 2d 383, 394, 116 S. Ct. 457, 465 (1995). The relationship between this rule and *Teague* is explained in Justice Kennedy's concurring opinion in *West*. "If the rule in question is one which of necessity *requires a case-by-case*

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11. Gray attacked the same factor in question 3 in his certiorari petition in the present case, but this Court has declined to hear it.

examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule." 505 U. S., at 308 (emphasis added).

The *Turner* majority quotes this statement but fails to understand it. A facial attack on a statute or a standard jury instruction, such as the one in *Turner*, does *not* require case-by-case evaluation of the evidence. Hence it does not fall into the same category as the rule of *Jackson* v. *Virginia*.

The *Turner* majority said that Turner "seeks the benefit of a rule that a vague aggravating factor must be supplemented with constitutionally sufficient limiting instructions or appellate review." 35 F. 3d, at 880. That is too broad a definition of the "rule." When jury instructions are attacked as unconstitutional in all or most cases, not just on the peculiarities of an unusual case,[12] and the state asserts *Teague*, "[t]he question is whether reasonable jurists could disagree over whether *the particular erroneous instruction at issue here* . . . violated the Constitution." *Gilmore* v. *Taylor*, 124 L. Ed. 2d 306, 323, 113 S. Ct. 2112, 2121-2122 (1993) (O'Connor, J., concurring in the judgment) (emphasis added);[13] see also *id.*, at 320, n. 3, 113 S. Ct., at 2119, n. 3 (plurality) (long-established standard instruction is "strong evidence of the reasonableness of the interpretation").

The *Turner* majority also relied on *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), which it said was a novel *specific* holding even though not "new" for *Teague*. See 35 F. 3d, at 884. That is how the *Penry* dissent sees the holding, 492 U. S., at 352-353 (opinion of Scalia, J.), and if the dissent were correct *Penry* would be wrongly decided. The majority, however, sees itself as merely enforcing a reservation expressly made in the original opinion upholding the Texas death penalty law, "that the special issues would be interpreted broadly enough to enable sentencing juries to consider all of the relevant mitigating evidence a

12. See *Graham* v. *Collins*, 122 L. Ed. 2d 260, 274 and n. 3, 113 S. Ct. 892, 901 and n. 3 (1993) (distinguishing *Penry*).

13. The word "erroneous" in this passage refers to an error of state law.

defendant might present." *Id.*, at 318. The rule having been established with that specific reservation, the enforcement of that reservation in a particular case was not a new rule.

While the Fourth Circuit in *Turner* was correct that *Teague* did not alter the *standard* of review on habeas, 35 F. 3d, at 886, the rule we now call *Teague* was intended from the beginning to alter the *scope* of claims cognizable on habeas corpus. See *Mackey* v. *United States*, 401 U. S. 667, 684 (1969) (opinion of Harlan, J.). The magnitude of this restriction was increased when this Court adopted a variation on Justice Harlan's theme which both broadened the definition of "new," see *Teague*, 489 U. S., at 301, and narrowed the second exception. See *id.*, at 312-313; see also *id.*, at 330-331 (Brennan, J., dissenting) (departure of *Teague* from original Harlan proposal).

This change in the scope of habeas also changed substantially the role of the lower federal courts. They had previously been mini Supreme Courts, with the power to invent new rules and impose them *de facto* on the state courts, even though they had no legal authority to bind state courts under *stare decisis*. See *Lockhart* v. *Fretwell*, 122 L. Ed. 2d 180, 193, 113 S. Ct. 838, 846 (1993) (Thomas, J., concurring). This power was often abused; some of the decisions were blatant evasions of this Court's precedents. Compare *Adamson* v. *Ricketts*, 865 F. 2d 1011, 1023-1029 (CA9 1988) (jury required in Arizona capital sentencing), with *Walton* v. *Arizona*, 497 U. S. 639, 647-648 (1990) (issue settled years earlier).

After *Teague*, the habeas function is limited to enforcing this Court's existing precedents and not making new rules. This is a less powerful and less personally rewarding task. Breaking new ground is the exciting part of appellate law, yet that is precisely what *Teague* forbids. See 489 U. S., at 301. Resistance to this change in decisions such as *Turner* should not be surprising, but it should be disapproved.

C. The Present Case.

Application of the foregoing *Teague* principles to the present case is straightforward. Petitioner's proposed rule falls within the category of a specific rule sought to be derived from a very broad, general principle. *Sawyer*, *Taylor*, and *Branch*, rejected

such claims. See *supra*, at 25. To the extent that his claim could be said to flow from *Gardner* v. *Florida*, he seeks to extend that case both farther from its core and to an entirely different kind of harm. Insufficient notice of evidence presented in open court is both vastly less harmful than Star Chamber secrecy and qualitatively different from it. No precedent of the type of *Jackson*, *Strickland*, *Miranda*, or *Brady*, setting a standard for a specific aspect of procedure but necessarily applied case-by-case, applies to this claim. Constitutionalization of existing nonconstitutional rules regarding discovery sanctions would be a new rule under *Sawyer*, *Taylor*, and *Branch*.

The sandbagging claim is *Teague*-barred, and it follows that the broader insufficient notice rule would be as well.

IV. Gray's proposed rule does not come close "to the primacy and centrality of *Gideon*."

Little need be said on Gray's claim to the second *Teague* exception. Gray was provided at state expense with two lawyers, not just one, and he does not challenge their effectiveness. He concedes he had no constitutional right to discovery. He does not deny that he failed tc request a lesser remedy than exclusion for the discovery violation. Any rule that would cover this situation is so far below the standard of *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990) as to not require discussion.

CONCLUSION

The decision of the Court of Appeals for the Fourth Circuit should be affirmed.

March, 1996

Respectfully submitted,

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